Supreme Court, U.S.
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In The

Supreme Court of the United States

WANG, Chun,

Petitioner(s)

v.

ALBERTO GONZALES,
Attorney General of the United States,

Respondent(s)

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. The Second Circuit Court of Appeal erred in denying Petitioner's request to reopen proceedings for adjustment of status where petitioner is not barred for statutory relief to adjust his status, contrary to the Second Circuit's own decision. The facts and the administrative record disclosed that there was not a valid voluntary departure order at the first place (8 USC § 1229c) and Petitioner did not receive a clear and proper notice of the consequences of failure to depart (INA § 242B (d), (e)(2)(B)).

2. On another hand, the five-year bar for statutory relief to Petitioner who failed to voluntarily depart had expired even if there were a valid voluntary departure order at the first place, contrary to the Second Circuit decision. The BIA's reinstatement of voluntary departure following *Matter of Chouliaris* and *Matter of Shar*, which infringed Petitioner's right to administrative review, is unconstitutional. Petitioner has been eligible to adjust his status as a Section 245(i) beneficiary.

3. There is a conflict between the Circuits in construing the "compelling reasons" for exceptional circumstance in terms of statutory relief. The Second Circuit erroneously narrowed the statute (INA § 242B(e)(2)), ruling that the change of law and extreme hardship for a business and Petitioner were not the compelling reasons for exceptional circumstance.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all the parties appearing here and before the United States Court of Appeals for the Second Circuit.

The petitioner here and appellant below is Wang, Chun.

The appellee below and respondent here is United States Department of Justice, Attorney General Alberto R. Gonzales.

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Cases

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Statutes and Regulations

8 USC §1252(a)(2)(B)(ii)
8 USC §1252b(e)(2)(A), (f)(2)
8 USC §1229c
8 USC §1105(a)(3)
8 USC §1182(c)
8 USC §1291
8 USC § 125
8 C.F.R. §3.1, 2
8 C.F.R. § 204, 245, and 299
INA §240B(d)
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INA §245(a), (i)
Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)
Pub.L. No. 104-208, 110 Stat. 3009-546, 1996

Other Authorities

Constitution of the United States

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit was entered on August 9, 2005, under the caption Chun Wang v. United States Department of Justice, Attorney General Alberto R. Gonzales, No. 03-4231 (2nd Cir. 2005)(unpublished). The judgment is attached hereto as Appendix "A". Petitioner filed a timely Petition for Panel Rehearing. The Petition for Rehearing was denied on October 11, 2005. The Order is attached hereto as Appendix "B". The unpublished Decision of the Board of Immigration Appeals dated January 10, 2003, is set forth as Appendix "C".

STATEMENT OF JURISDICTION

The judgment of the United States of Appeals for the Second Circuit was entered on August 9, 2005. Jurisdiction of the United States of Appeals for the Second Circuit is based upon 8 USC Section 1252(a)(2)(B)(ii), in that the appeal was from a decision of the Board of Immigration Appeals of the Executive Office of Immigration Review (hereinafter "EOIR"). Jurisdiction of the United States of Appeals for the Second Circuit is also founded on the United States Code Title 8 Section 1291 and Section 1254.

The Petition for Writ of Certiorari has been filed on January 9, 2006, within the period prescribed by law ninety (90) days from the date of the decision of the United States of Appeals for the Second Circuit on October 11, 2005, denying Petitioner's petition for Rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The question presented for review implicates the following provision of the Constitution of the United States:

Amendment V

No person shall be ... deprived of life, liberty, or property without due process of law ....

The question presented for review implicates the following statutory provisions:

a. 8 USC Section 1229c, which states that the Attorney General may permit an alien to voluntarily depart the United States at the alien's own expense if the Immigration Judge enters an order granting voluntary departure in lieu of removal and finds that the following four requirements are met:

1. The alien must have been physically present in the United States for at least one year prior to the service of the Notice to Appear (NTA).
2. The alien must be found to have had good moral character for at least five years prior to the granting of voluntary departure.
3. The alien must not be deportable under the aggravated felony section (1227(a)(2)(A)(iii)) or the security-related grounds in 1227(a)(4).
4. The alien must establish, by clear and convincing evidence, that he or she has the means to depart the United States, and intends to do so. 8 U.S.C. § 1229c(b)(1)(A)-(D).

b. INA Section 242B(e)(2)(B) provided that first, the consequences of failing to depart did not apply unless proper notice was provided. Second, the statute also required that both written and oral notice (in a language the person understands) was provided.

The section goes on to call for "notice" to be given to the one being granted voluntary departure. Section 240B(d) of the ACT requires that the notice granting voluntary departure inform the person of the consequences of failing to depart. The statute states, "The order permitting the alien to depart voluntarily shall inform the alien of the penalties under this subsection."

c. Former section 242B of the Immigration and Nationality Act ("INA" or the "Act") provides that an individual is ineligible for adjustment of status if he or she was granted voluntary departure but nonetheless remained in the United States. The statutory period of ineligibility is five years "after the scheduled date of departure or the date of unlawful reentry, respectively." 8 U.S.C. Section 1252b(e)(2)(A) (Supp. 1995).

d. Under Section 242B(e)(2), in pertinent part, as follows:

> (A) IN GENERAL.---Subject to subparagraph (B), any alien allowed to depart voluntarily under section 244(e)(1) or who has agreed to depart voluntarily at his own expense under section 242(b)(1) who remains in the United States after the scheduled date of departure, other than because of exceptional circumstances, shall not be eligible for relief

described in paragraph (5) for a period of 5 years after the schedule date of departure or the date of unlawful reentry, respectively.

Under Section 242B(e)(5), the relief described in subparagraph (A) includes "voluntary departure under Section 242(b)(1)," "suspension of deportation or voluntary departure under Section 244," and "adjustment or change of status under Section 245, 248 or 249." The term "exceptional circumstances" refers to "exceptional circumstances (such as serious illness of the alien or death of an immediate relative of the alien) beyond the control of the alien." Section 242B(f)(2) of the Act.

REASONS FOR GRANTING THE WRIT

1. The instant petition involves a legal issue of whether an alien who did not obey an invalid voluntary departure order and did not receive a proper and clear notice of the consequences of failing to depart as required by former INA Section 242B(e)(2)(B), is barred from statutory relief to adjust his status. The administrative record clearly shows that the IJ did not make the findings of whether Petitioner had the means to depart the United States and intended to do so when the IJ granted Petitioner voluntary departure. Granting voluntary departure is not the discretion of the IJ; therefore, the voluntary departure order is invalid without the findings of statutory requirements. Furthermore, Petitioner did not receive the written notice and oral notice in both English and Chinese of the consequences of failure to depart (INA § 242B (d), (e)(2)(B)). Thus, Petitioner is not barred for statutory relief to adjust his status.

2. Further, the instant petition involves a question of exceptional importance, whether or not, the BIA's reinstatement of voluntary departure in *Matter of Chouliaris* and *Matter of Sharr* is unconstitutional, full regard of constitutional rights should be given to an alien if he is in the United States and pursues administrative review. There had been eight years passed at the time the BIA denied Petitioner's motion to reopen based upon his Section 245(i) beneficiary status since he was granted the voluntary departure on June 04, 1996. The requisite to qualify for statutory relief accrued to more than five years due to the BIA's reinstatement of voluntary departure. The BIA's reinstatement of voluntary departure infringes Petitioner's constitutional right to due process for administrative review.

3. There is a conflict between the Circuits in construing the "compelling reasons" for exceptional circumstance in terms of statutory relief. The Second Circuit narrowly interpreted the statute (INA § 242B(e)(2)), ruling that the change of law and extreme hardship for a business and petitioner were not the compelling reasons for exceptional circumstance. It is recognized by the Third Circuit and Ninth Circuit and subsequently adapted by the IJ and BIA that the failure of departure but with a good-faith-filing motion for Section 245(i) relief within the period of voluntary departure constitutes the exceptional circumstance for relief ban.

STATEMENT OF THE CASE AND FACTS

Petitioner, Chun Wang, a native and citizen of the People's Republic of China, who fled to the United States under an assumed name on or about December 4, 1994, sought political asylum based upon his opposition to the China's coercive family planning and involvement in the pro-democracy movement.

Petitioner and his wife, ZHENG, Qingfang, got married in China in the month of December 1992 and were unable to have the marriage officially registered at that time due to his wife being under age. The marriage certificate was not actually issued until October 1994 after his wife paid the ¥ 3000 (RMB) fine. During this period Petitioner and his wife had their first child, a girl named WANG, Shi Ting born on September 21, 1993 (lunar calendar) or November 04, 1993 (Gregorian calendar) in China.

Subsequent to the birth of their child, Petitioner continued to be unaware of the existence of the marriage certificate even during his June 5, 1996 individual hearing before the IJ. At the end of 1996, Petitioner called his wife, mentioning that he might lose the asylum case. It was then, that Petitioner's wife disclosed the existence of the marriage certificate.

Petitioner's wife was demanded by Chinese family planning officials to wear IUD after their first child was born. Both Petitioner and his wife refused to insert the IUD and Petitioner had an argument with the local authorities for such refusal. In or around February 1994, the Petitioner attempted to register their daughter into the household registry but was

turned away by the local authorities due to their refusal to insert the IUD.

A summons demanding that Petitioner report to the local police precinct on April 25, 1994 was issued as a result of his argument with the local authorities over their refusal to insert the IUD. Petitioner went into hiding in Hebei Province in May of 1994. He left China for the safety of the United States on or about December 4, 1994.

A removal hearing was held before the Immigration Court on or about June 5, 1996. The IJ denied Petitioner's application for asylum and for withholding of deportation under the INA due to the lack of credibility. In addition, the IJ ordered a voluntary departure until July 5, 1996 with an alternative order of deportation to the People's Republic of China. However, in the hearing, Petitioner did not request for a voluntary departure, nor did the IJ make the findings whether Petitioner had the means to depart the United States, as 8 USC § 1229c requires. As a matter of fact, Petitioner did not possess a valid passport at that time.

Upon remand to the Immigration Court after a timely appeal to the BIA by Petitioner, a removal hearing was held on September 23, 1998 by the same IJ. On November 12, 1998, the IJ denied Petitioner's application for asylum upon his opposition to the China's coercive family plan and for withholding of deportation, once again due to the lack of credibility. In addition, the IJ ordered a voluntary departure until December 21, 1998 with an alternative order of deportation to the People's Republic of China. Again, Petitioner did not have the intent to depart the United States nor have a valid passport to depart at that time.